ATTORNEY FOR APPELLANT,
Jesse Sutton:

DEREK L. MANDEL
Mandel Pollack & Horn, P.C.
Carmel, Indiana

ATTORNEYS FOR APPELLANT,
United Services Automobile Association:

KARL L. MULVANEY
NANA QUAY-SMITH
Bingham McHale, LLP
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES:

WILLIAM H. KELLEY
DARLA S. BROWN
Kelley, Belcher & Brown
Bloomington, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JESSE SUTTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 53A01-0708-CV-377
	)	
ROBERT GARDNER and JULIA GARDNER,	)	
	)	
Appellees-Plaintiffs,	)	
	)	
	)	
	)	
UNITED SERVICES AUTOMOBILE ASSOCIATION,	)	
	)	
Appellant-Intervenor.	)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Mary Ellen Diekhoff, Judge

June 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Jesse Sutton ("Sutton") appeals from the trial court's denial of his motions for directed verdict and to correct error in a personal injury action brought against him by Robert and Julia Gardner.

We affirm.

ISSUE

Whether the trial court erred in denying his motions.

FACTS

At approximately 9:50 a.m. on March 6, 2002, Robert was driving his pick-up truck near the intersection of State Road 45/46 West and State Road 37 in Bloomington. He prepared to exit State Road 45/46 West and came to a complete stop at the stop sign at the end of the exit ramp. The exit ramp was under construction and marked with construction barrels and barricades. While Robert's vehicle was stopped, and before he could turn onto State Road 37, his truck was rear-ended by Sutton's van. Sutton was pulling a U-Haul trailer and traveling at a rate of approximately thirty to forty miles an hour. On impact, Robert's head struck his steering wheel, then snapped backwards and smashed out the rear window of his truck. Robert was transported to the emergency room of Bloomington Hospital.

On February 13, 2004, the Gardners filed a complaint against Sutton, wherein they alleged that Robert had suffered personal injuries and property damage as a result of Sutton's negligence, and that Julia had suffered a loss of consortium. The ensuing jury trial commenced on May 9, 2007, and went on for two consecutive days. At trial, Robert's family members testified about his "workaholic" tendencies before the accident, and the adverse effect of the accident thereupon. (Tr. 293). The jury heard testimony that Robert, who was seventy years of age at the time of trial, was previously a hardworking man who "worked every day from sun up to sun down" and "just never let up." (Tr. 167). Witnesses described Robert as "very independent," "very prideful," and "not a person that ask[ed] for help." (Tr. 165). Robert's daughter testified that for decades, he had worked two jobs – as a firefighter and as a concrete finisher for his own company.[1] Witnesses testified that both jobs were "extremely demanding" and that when Robert retired from the fire department in 1998, "he was in very good shape" and physically capable of continuing to work as a concrete finisher. (Tr. 153, 172).

The jury also heard testimony that Robert worked twelve-plus hour days as a concrete finisher, "pour[ing] the concrete out, bend[ing] over and strik[ing] it off, float[ing] the edges and . . . . trowel[ing] it, finish[ing] it, [and] broom[ing] it." (Tr. 176). His son and grandson testified as to the rigors of concrete finishing work, explaining that "you have to work fairly hard[,] usually bent over and [it is] just pretty physical." (Tr. 175). Witnesses testified that Robert was capable of performing the physical labor

[1] Robert had worked concrete for approximately fifty years, and was employed with the fire department for thirty years.

required in concrete finishing work before the accident; however, afterwards, they observed a significant decline in his physical ability. Robert's son testified that after the accident, "he couldn't hardly [sic] do it anymore . . . . " (Tr. 184).

Robert's long-time friend and fellow firefighter, Chuck Mulry, testified that he too observed marked changes in Gardner's ability to perform physical labor after the accident. Mulry testified that he had seen Robert "stumble and fall" and generally have difficulty maintaining his balance as he walked. (Tr. 173). He also testified that Robert had difficulty operating a motor vehicle and frequently required someone to drive him to his work sites, where he "sometimes could get out of the truck, other times he stayed in the truck." (Tr. 164). According to Mulry, Robert needed others to work for him, worked shorter days, and was confined to working primarily in a supervisory capacity. Mulry explained, "[A]ll he ever did was . . . look because he just did not have that ability to do anything else." (Tr. 164). Other witnesses testified that after the accident, Robert "physically struggle[ed] more" with movement of his neck and extremities; was unable to pour, level or trowel concrete; could not lift tools from the bed of his truck; could not turn his head "without turning his entire body"; and needed assistance with basic household tasks like changing light bulbs and batteries in smoke detectors and other tasks that required him to bend his neck forward or backward. (Tr. 275-76, 165, 162).

Witnesses testified further that Robert struggled emotionally with his newfound physical limitations and his inability to work. They noted drastic changes in Robert's personality after the accident. The jury heard testimony that before the accident, Robert was "not a person that ask[ed] for help;" but after the accident, he express[ed] frustration

that he couldn't get out and work," (Tr. 163), "complain[ed] a lot," (Tr. 276); and would "break down emotionally . . . and . . . cry[ ]," (Tr. 277). Julia also testified that after the accident, Robert "went through a lot of depression, very nervous and sleepless nights." (Tr. 304). He was also "grouchy" and "ill-mooded." (Tr. 305). She testified further that she and Robert had experienced "a lot grief, a lot of unhappy times because he's not the happy man that I married due to the fact that he's injured and it's caused me to have a lot of problems also." (Tr. 328). Lastly, under cross-examination, Julia testified that she was not personally seeking monetary damages; however, the Gardners' counsel noted for the record that Wife had filed a loss of consortium claim.

Next, the jury heard testimony from Robert about the events surrounding the accident and its aftermath. He testified that his vehicle was stopped at the stop sign right on the exit ramp when Sutton rear-ended him. Robert testified that after the collision, Sutton approached him and said, "'I knew I was gonna [sic] hit you, but I couldn't, my brakes wouldn't stop me . . . ." (Tr. 337). Robert testified that he required medical attention for his injuries following the crash. He testified further that before the accident, he was in good health -- his only medical concern being his rheumatoid arthritis, which had never interfered with his ability to finish concrete; however, after the accident, Robert testified that he was "stiff and sore . . . couldn't bend [his] head . . . . couldn't bend [his] neck and, and my arms I couldn't raise them up good or nothing [sic] . . . ." (Tr. 345). He also testified that he could no longer "get up and down good [sic]" (Tr. 345); "get down and trowel the edges on a sidewalk or a driveway or trowel anything and get [back] up with[out] just about laying [sic] down to push [him]self up . . . .," (Tr. 345).

He testified about problems with his neck, back, arms and knees, and difficulty with basic physical maneuvers. Robert also testified that after the accident, he attempted to return to work in his former capacity, but either had to stop prematurely due to neck and back pain or simply "couldn't do it." (Tr. 346).

During his testimony, Robert stated that he had been involved in another car accident in the summer of 2004, during which his truck flipped onto the driver's side. Robert testified that he was not injured in the accident and neither required nor received medical treatment afterwards. Robert was also questioned about accidents on construction sites, including a fall that resulted in cracked ribs. He denied any link between these accidents and the neck and back pain complained of herein.

After the accident, Robert's primary care physician referred him to Dr. Todd Rowland, a physical medicine and rehabilitation specialist. Dr. Rowland testified, by way of a video deposition, that at his first consultation with Robert on July 10, 2002, Robert complained of pain on both sides of his neck, as well as shoulder and back pain. Dr. Rowland testified that he conducted a physical examination of Robert and observed that Robert was "several weeks into a problem that do [sic] not appear to be resolving with time or physical therapy." (Tr. 207).

Dr. Rowland testified that after a series of appointments, referrals, physical therapy and medication trials, he concluded that Robert's injuries were "permanent" and that Robert had "plateau[d]" or "reached maximum medical improvement . . . because given the length of time and the extent of treatment that [Robert] had, [Dr. Rowland] did not feel like there were . . . other significant treatment options." (Tr. 227, 221). Dr.

Rowland testified that he had found "a causal relationship between the accident and [Robert's] problem," and concluded that Robert had suffered a "ten percent whole person permanent partial impairment." (Tr. 227, 226). Robert ceased receiving medical treatment for his injuries in February of 2004.

At the close of Robert's evidence, Sutton's counsel orally moved for a directed verdict, arguing that Robert had presented "absolutely no evidence . . . indicating negligence on the part of . . . Mister Sutton." (Tr. 391). The trial court denied the motion, stating,

> [T]here is sufficient evidence of negligence to put this in front of the jury. There was in fact deposition [sic] read by [Robert]'s attorney at the beginning of the case regarding, . . . Mr. Sutton's actions and . . . [Robert] also testified that Mister Sutton made statements at the time of the accident about seeing [Robert]'s vehicle and . . . said either something like, there was nothing I could do, I was unable to stop which the Court feels is enough . . . question of fact now to put this in front of the jury and to, ah, survive the directed verdict, so your motion is denied.

(Tr. 394-95).

The defense then called Sutton as well as its own medical expert to testify. Sutton testified that he had just stopped for directions on his way to return a U-Haul trailer when the accident occurred. He testified that because he was unfamiliar with Bloomington, he chose to drive at approximately thirty or forty miles per hour when he turned off State Road 45/46 West and onto the on-ramp for State Road 37. He testified that he saw a sign that indicated that there was a stop sign ahead. According to Sutton's testimony, the road curved ahead and he initially could not see either the stop sign or Robert's stopped

vehicle. Approximately one-half to one-quarter of a mile from the stop sign, Sutton attempted to brake, but "nothing" happened. (Tr. 437). On the witness stand, he stated,

> I just kept working . . . trying to pump brakes, . . . I got down . . . a hundred yards or so from the stop sign, . . . look[ed] on the left and that area[s] [was] dug out so I couldn't drive over there cause [sic] it was a drop off. * * * [I] looked at the right, thought about going into the right and I saw the, barrels and stuff were there . . . .
>
> * * *
>
> Right up until the last moment . . . at the time I really realized I probably wasn't going to stop, . . . I had barrels and, . . . a frame made out of metal . . . that looked like it would . . . have come in [the windshield] if I had hit the . . . stuff on the [right] side.

(Tr. 439). Faced with the barrels on the right shoulder and the drop-off to the left, Sutton testified that he decided to stay on course and "just kept hoping that [Robert] would pull away from the stop sign." (Tr. 441).

In the following colloquy between Sutton and the Gardners' counsel, Sutton acknowledged the availability of the shoulder on the right side of the exit ramp as an alternative to rear-ending Robert's vehicle. (Tr. 462).

> [Gardners' counsel]: And you could have gone that way if you had decided to do that about anytime in this quarter of a mile to half a mile [before the stop sign]?
>
> [Sutton]: Yes. But going to the right wouldn't have made my brakes work any better.
>
> [Gardners' counsel]: No, but it would have kept you from hitting [Robert] in the back going full speed, wouldn't it?
>
> [Sutton]: Yes, it would have. I did make, possibly make a bad judgment call there . . . , I should have hit . . . the barrels and the . . . barrier.

(Tr. 462). Sutton also testified that he had no indication of any problems with his brakes prior to the accident and further, that he had no evidence that his brakes had, in fact, malfunctioned.[2]

The defense's final witness was its medical expert, Dr. John R. McLimore. He testified that he performed a physical examination of Robert on May 18, 2005. Dr. McLimore testified that in his opinion, Robert's age, excessive workload, years of hard physical labor, obesity, and rheumatoid arthritis were the "underlying, predisposing issues or setting factors for [the] ongoing musculoskeletal complaints that [Robert] described." (Tr. 494). He testified further that in his view, Robert had suffered "a strained whiplash [with] some neck pain" as a result of the accident, and that the medical treatment that Robert received between two and six weeks after the accident was likely "caused and necessitated by the March 2002 accident." (Tr. 495. 491). Dr. McLimore testified that any subsequent medical treatment received after the six week period "would not have provided any new information," suggesting that Sutton should not be held liable therefor. Lastly, Dr. McLimore testified that Robert's complaints after the two- to six-week period immediately following the accident were "quite consistent" with Robert's age, excessive workload, years of hard physical labor, obesity, and "rheumatoid arthritis related pattern predating" the accident. (Tr. 495).

At the conclusion of the defendant's case on May 11, 2007, the case was presented to the jury. The jury deliberated and returned a verdict for Robert in the amount of

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[2] Sutton testified that the impound facility denied him access to the totaled vehicle for any purposes beyond the retrieval of his personal possessions.

$175,000.00 and for Julia in the amount of $25,000.00. On June 15, 2007, Sutton filed a motion to correct error, which motion was summarily denied on July 19, 2007. Sutton now appeals.

Additional facts will be added as necessary.

DECISION

Sutton first contends that the trial court erred in denying his motion for directed verdict or motion for judgment on the evidence. Specifically, he contends that Robert failed to establish that Sutton's operation of his vehicle constituted a breach of the duty of care owed to Robert.[3] In addressing this contention, we consider the following:

> The purpose of a motion for judgment on the evidence is to test the sufficiency of the evidence. Where all or some of the issues in a case tried before a jury . . . are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict.
>
> When reviewing a trial court's ruling on a motion for directed verdict, we use the same standard as the trial court. We will not substitute our judgment for that of the jury on questions of fact. Instead, we determine only: (a) whether there exists any reasonable evidence supporting the claim; and (b) if such evidence does exist, whether the inference supporting the claim can be drawn without undue speculation. We consider the evidence in the light most favorable to the nonmoving [party].

Faulk v. Northwest Radiologists, P.C., 751 N.E.2d 233, 238 (Ind. Ct. App. 2001) (internal citations omitted).

[3] Sutton also argues that he encountered a sudden emergency -- namely, brake failure --- for which he was not responsible; however, he has failed to present any evidence, absent his own self-serving statement, that his brakes did, in fact, fail.

To prevail on a theory of negligence, Robert was required to prove that (1) Sutton owed him a duty; (2) Sutton breached the duty; and (3) that Robert's injuries were proximately caused by the breach. *See Winchell v. Guy*, 857 N.E.2d 1024, 1026 (Ind. Ct. App. 2006). At the close of the Gardners' evidence, Sutton moved for directed verdict on grounds of insufficient evidence to establish breach of duty, and the trial court denied the motion, finding that there was sufficient evidence to allow the case to go to the jury. Thus, we address only the issue of breach in this appeal.[4]

At trial, Robert presented sufficient evidence from which the jury could have found that Sutton failed to properly maintain control of his vehicle and thereby, breached his duty of care when he failed to avoid the collision.

Sutton testified that after his brakes allegedly failed, approximately a quarter of a mile to a half mile from the stop sign, he could have veered onto the shoulder on the right side of the road; however, he declined this option, and instead stayed his course, "hoping that [Robert] would pull away from the stop sign." (Tr. 441). Reflecting upon the circumstances surrounding the collision, Sutton testified that in hindsight, he "did make, possibly make a bad judgment call there . . . , [and] should have hit . . . the barrels and the . . . barrier," instead of rear-ending Robert's truck at a rate of thirty to forty miles per hour. (Tr. 462). Robert also challenged the rate of speed at which Sutton was traveling

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[4] "'Absent a duty, there can be no breach, and therefore, no negligence.'" *McDonald v. Lattire*, 844 N.E.2d 206, 212 (Ind. Ct. App. 2006). Sutton does not dispute that he, "as a motorist, owed Robert a duty to use due care in the operation of his vehicle." Sutton's Br. at 5 (citing *Thomas v. Indiana DOT*, 698 N.E.2d 320, 323 (Ind. Ct. App. 1998)). *See Miller v. Indiana Dept. of Workforce Development*, 878 N.E.2d 346, 357 (Ind. Ct. App. 2007) ("In Indiana, a motorist has a duty to use due care to avoid a collision and ... to maintain a lookout while traveling on a highway").

at the time the accident occurred, given his unfamiliar surroundings; and Sutton's failure to present any evidence to support his claim of brake failure.

We find that sufficient reasonable evidence exists to support Robert's claim that Sutton breached his duty of care owed to Robert, and that the inference supporting the claim can be drawn without undue speculation. Moreover, because we agree with the trial court's finding that whether Sutton's failure to avoid the crash constituted negligent breach was a question of fact for the jury, we cannot substitute our judgment for that of the jury. *Faulk*, 751 N.E.2d at 238. *See also Guy's Concrete, Inc. v. Crawford*, 793 N.E.2d 288, 293 (Ind. Ct. App. 2003) (stating that where facts are disputed and various inferences can be drawn therefrom, the determination of whether an act or omission is a breach of one's duty is generally a question of fact). We conclude that the trial court did not err in denying Sutton's motion for directed verdict.

2. Motion to Correct Error

Next, we address the trial court's denial of Sutton's motion to correct error. Sutton contends that the jury verdicts for Julia in the amount of $25,000.00 and for Robert in the amount of $175,000.00 were "clearly excessive" and "subject to remittitur." Sutton's Br. at 10. With respect to Julia, Sutton contends that because she testified that she "suffered no physical injuries or monetary damages," the jury's verdict must have been improperly motivated by "prejudice, passion, partiality, corruption or some other improper element." Sutton's Br. at 7. As to Robert, Sutton argues that jury verdict was similarly influenced by improper considerations because Robert claimed to have "suffered only $13,000.00 in medical specials, had not been treated for his accident since

February 2004, and did not have any impairment rating directly attributable to th[e] March 6, 2002 accident." Sutton's Br. at 8.

We review the trial court's decision on a motion to correct error for abuse of discretion. *Principal Life Ins. Co. v. Needler*, 816 N.E.2d 499, 502 (Ind. Ct. App. 2004). An abuse of discretion will be found when the trial court's action is against the logic and effect of the facts and circumstances before it and the inferences that may be drawn therefrom. *Id*. An abuse of discretion also results from a trial court's decision that is without reason or is based upon impermissible reasons or considerations. *Id*. Indiana Trial Rule 59(J) requires a trial court to grant a new trial on a motion to correct error if the trial court determines that the jury verdict is "against the weight of the evidence," and to enter judgment if it determines that the jury verdict is "clearly erroneous as contrary to or not supported by the evidence." *Paragon Family Restaurant v. Bertolini*, 799 N.E.2d 1048, 1055 (Ind. 2003) (citing Ind. Trial Rule 59(J)).

"A jury's determination of damages is entitled to great deference when challenged on appeal." *Sears Roebuck and Co. v. Manuilov*, 742 N.E.2d 453, 462 (Ind. 2001). In considering a claim of an excessive jury verdict, we neither reweigh the evidence nor judge the credibility of witnesses, and consider only the evidence favorable to the award. *Fowler v. Campbell*, 612 N.E.2d 596, 603 (Ind. Ct. App. 1993). A judgment is not excessive unless the amount cannot be explained upon any basis other than prejudice, passion, partiality, corruption or some other improper element. *Id*. A damage award must be supported by probative evidence and cannot be based on mere speculation,

conjecture, or surmise. *Id*. Thus, a damage award will be reversed only when it is not within the scope of the evidence before the finder of fact. *Id*.

We first address Sutton's claims with regard to Julia. Sutton argues that Julia "was directly examined with regard to her contention that the subject collision ha[d] in some way affected her material, emotional and/or physical relationship with [Robert]," but failed to "offer any evidence or suggestion that she had suffered *any* damages." Sutton's Br. at 9. Thus, he argues, given the alleged lack of evidence, the jury's finding that Julia suffered loss of consortium must have been improperly influenced. We disagree.

A loss of consortium claim is a claim derivative of the injured spouse's personal injury claim. *Evans v. Buffington Harbor River Boats, LLC*, 799 N.E.2d 1103, 1112 (Ind. Ct. App. 2003). Consortium has been defined to include both tangible and intangible elements. *Id*. "In addition to the provision of material services, consortium includes both conjugal and other elements of companionship -- such as service, aid, fellowship, companionship, company, cooperation, and comfort, -- it also includes material services, i.e., calculable and monetary damages, as well as love, care, and affection." *Id*.

The record reveals that Julia gave extensive testimony as to the adverse effects of the collision on her relationship with her husband. Julia testified that Robert's ability to assist her with household tasks was significantly diminished after the accident. He was unable to change light bulbs and smoke detector batteries, mow the yard, or shovel snow. Julia, noting changes in Robert's personality and temperament, also testified that "[Robert was] not the same man" that she had married years earlier. (Tr. 328). Julia,

testified that before the accident, Robert complained rarely and was "a workaholic" (Tr. 293)"; however, after the accident, he required a great deal of assistance. Julia testified that in addition to being Robert's caregiver, she also drove him to work sites and medical appointments.

Julia testified further that after the accident, Robert's "mood changed." (Tr. 305). He "went through a lot of depression, very nervous and sleepless nights," (Tr. 304); was "grouchy" and "ill-mooded," (Tr. 305); and "complain[ed]," (Tr. 316), frequently about being in pain. She added,

> [I]t has caused, you know, a few problems. I mean, not marital problems, but a lot of grief, a lot of unhappy times because he is not the happy man that I married due to the fact that he's injured and it's caused me to have a lot of problems also.

(Tr. 328).

Based upon the foregoing, we find that Julia presented evidence that could support a jury determination that she had suffered loss of consortium and was entitled to an award of damages. In light of Julia's testimony as to the various practical and emotional adjustments that resulted from the accident, we find sufficient probative evidence to support the jury's award to Julia, and that there exist several bases "other than prejudice, passion, partiality, corruption or some other improper element," upon which the jury's award of $25,000.00 can be explained. Thus, we cannot find that the jury's award was excessive. Nor do we find that the trial court's denial of Sutton's motion to correct error, with regard to Julia's verdict, was against the logic and effect of the facts and

circumstances before it and the inferences that may be drawn therefrom. Accordingly, we find no abuse of discretion.

Next, we address Sutton's claims with regard to Robert. Sutton argues that the jury's award to Robert was "improperly influenced" by considerations of "passion and/or sympathy" because Robert's "only evidence" in support of a damage award consisted of submissions of $13,000.00 of medical specials and Dr. Rowland's testimony attributing Robert's injuries to the accident at issue. Sutton's Br. at 11. Again, we disagree.

At trial, Robert testified that prior to the accident, he worked "from day light until dark" working as a concrete finisher. (Tr. 332). The jury heard testimony, from various witnesses, that concrete finishing work is extremely labor-intensive and that Robert was physically capable of doing the work prior to the accident, despite his pre-existing rheumatoid arthritis condition. After the accident, however, Robert testified that he experienced stiffness, soreness, and an inability to bend his neck or raise his arms. (Tr. 339). Robert testified that he was subsequently unable to perform the physical labor required in concrete finishing work, such as heavy lifting, leveling, troweling, and pouring of concrete, and operation of machinery. (Tr. 346). He testified further that as a result of his inability to do the physical labor himself, he needed others to work for him and was relegated to a supervisory role in his concrete finishing business.

The jury also heard the testimony of Robert's family members and friends, attesting that after the accident, the previously "very independent" and "very prideful" former firefighter and concrete finisher required assistance with such minor tasks as changing light bulbs and batteries in smoke detectors, mowing the lawn or shoveling

snow – "things that he normally would do himself." (Tr. 165). They testified that Robert's ability to do concrete finishing work was vastly diminished after the accident because he tired easily and was unable to bend his neck forward and backward, to maintain his balance, or to "turn [his head] without turning his entire body." (Tr. 189).

Robert's family members and friends also testified at length about the "pretty strong emotional change" that they observed in him after the accident. (Tr. 277). They testified that he was less "happy go lucky," more "grouchy [and] ill-mooded," became easily frustrated and "irritable," and was more prone to "break[ing] down emotionally," and "crying." (Tr. 166, 305, 189, 277). Julia also testified that Robert "went through a lot of depression, [and] very nervous, sleepless nights." (Tr. 304).

Lastly, Dr. Rowland testified that he found "a causal relationship between the accident and [Robert]'s problem[s]." (Tr. 227). He concluded, after a battery of tests, rounds of physical therapy, referrals, and ineffectual medications, that Robert had suffered permanent limitations in his functional status, would continue to experience decreased range of motion in both his neck and lower back, and pain with "some fairly basic maneuvers." (Tr. 223). Dr. Rowland testified further that Robert had "plateau[d]" or "reached maximum medical improvement," and that there were no significant further options. (Tr. 221).

Based upon the foregoing facts, we find that Robert presented reasonable sufficient evidence that could support a jury determination that he suffered damages considerably in excess of his $13,000.00 of medical specials. Robert and his witnesses testified at length that his employment and personal relationships were negatively

affected by the accident. We find ample proper bases upon which the jury's award can be explained. Thus, we find that the jury's award was not excessive and, further, that the trial court did not abuse its discretion.

Affirmed.

NAJAM, J., and BROWN, J., concur.